SECTION II.—DISTINCTION BETWEEN RIGHTS (SERVITUDES) AND OWNERSHIP.

§ 1.

As it is clear then, that a servitude or right residing in one person over the property of another person, may exist without any way touching the ownership (though limiting its enjoyment), it follows that no right-holder has any share in the property, or is a *co-owner of the estate.* Nor will the exercise of mere rights of user or separate servitudes, however extensive, however long enjoyed, ever give rise to a claim to ownership in the estate.

This principle, which is indeed obvious, but still is of great importance to have clearly established, has been constantly overlooked by those who have seen difficulties in the way of forest legislation in some parts of India.

An attempt to appropriate a large area of forest on the west coast of India (North Kanara District), partly in contravention of this principle, has recently failed[2]. The plaintiff in that case pretended, indeed, that he had grants and 'sanads,' which turned out to be either forged or otherwise invalid; but apart from that, it was contended that because he (and his ancestors) had been in the habit of cutting down patches of forest for temporary cultivation here and there over the area claimed, and had also paid the assessment of revenue taken from "kumri"-cutters, that, *therefore,* he became entitled, not merely to a right to this practice as a servitude (which is another matter altogether), but to be considered owner of the soil, in fact of the forest estate itself. It was

(2) The disappearance of the servient estate (example above given of a forest washed away or completely burned down).

(3) The dominant and the servient estate became one. Government forfeits for crime a village which had a right of grazing in its forest. Here both estates become the property of Government; the right is extinguished.

(4) The right is compensated for.

(5) Is lost by consent, or by interruption submitted to.

(6) Is lost by prescription.

[2] The Kanara case (see list of abbreviations).

shown that, no doubt, persons holding land, did, as a matter of practice, go into the jungle near at hand and make temporary clearings; and that when it was known they did this, the Government charged each cutter (or the landholder who employed or allowed him) with a certain tax per knife used in clearing the ground; but the Judges (though giving different judgments on the case at large) both held that this did not indicate a permanent occupation of the soil itself. The Government officials put a tax on everything of the kind—pepper and other wild forest produce included. This was clearly not the same thing as Government admitting a permanent right in the soil and assessing land revenue on it and engaging with the holder to pay it, as being in proprietary possession[3].

§ 2.

It may also be inferred from the language of Indian Statutes that our legislature has never admitted the idea that a right-holder has anything in the nature of a share in the ownership. It is only necessary to look to the Limitation, the Land Acquisition, and other Acts, to see that a distinction is drawn between rights *in* land and rights *over* land—a distinction which would have no meaning of rights of way, of grazing, &c., constituted a share *in* the land ownership itself. The definition in the Limitation Act also expressly alludes to rights in virtue of which "*one person* is entitled to appropriate for his own profit, any part of the soil or anything growing on it, *belonging to another*."

[3] The mere fact of "having made temporary use, or intending to make use actually or potentially, of a particular area or parts of it, is not possession" giving rise to proprietary right (Kanara case, page 581). And again "should it be considered that the plaintiff had established a right * * * * to have kumri cultivation carried on in certain places, such a right would not involve general ownership in the soil" (pages 513 and 514). This is no doubt the correct doctrine; and I think the learned Mr. Joshua Williams must have a moment forgotten the distinction between acts which may give rise to a claim to a servitude or right of common, and those which amount to taking possession of the soil, when he wrote his remarks on the case *Tyrwhitt* v. *Wynne* (Williams, page 155). The learned author also quotes another case, which is directly against his own remarks, and supports the judgment in the Kanara case.

§ 3.

Besides this direct authority in India, the proposition is fully established by authority of the laws and text-writers in Europe.

It is well known that at the time of the first French revolution great interest was taken by the revolutionary party in the work of destroying all that savoured of feudalism, or of any special privileges of the aristocratic class. And an attempt was made in this interest, to assert that rights of user, which were exercised by the common people in the forests of the nobles or the State, constituted a co-ownership or share in the proprietary right in the forest itself. M. Proudhon, an eminent jurist of Dijon (otherwise of great authority), adopting the revolutionary views, supported this view, and it was actually embodied in a law of 1792, which gave the right-holder the power to demand a partition of the forest and to get a share of the estate in lieu of his right[4]. The Forest Code of 1827, however, repealed the law of 1792, and declared that the right-holder had only his right (servitude), and that if it was to be bought out by money or by "grant of land" (*cantonnement*) it was the proprietor of the forest only who could proceed to this[5].

[4] M. Proudhon's views are discussed in the Répertoire (Dalloz et Meaume, Art. "*Usage*," paragraph 237). The principle was actually adopted in the law of 28th August 1792 (Art. 5), (Meaume: Vol. I., §. 7) which gave the right-holder the right of demanding "cantonnement," that is, of claiming a part of the estate itself in lieu of his right; in other words, demanding a division of the estate as if he was a co-sharer in it. It seems clear, however, that M. Proudhon allowed himself to be carried away by zeal for the cause of popular emancipation; and his assertion that the rights of user were "même en quelque chose du droit de propriété foncière" is not consistent with his own opinions elsewhere expressed. For example, in dealing with the question whether a person can have such an extensive right as to deprive the forest proprietor of the *whole* of *the products*, this same author says (in a passage referred to by Meaume, Volume I, § 192, page 250)—"It would be contrary to the nature of things to give such an interpretation to a concession of *right of user*, because that would be, in some sort, to convert the grant into an act of alienation *of the estate itself*. It is more reasonable to hold that the founder of a *simple right of user* intended only to associate the grantee with himself in the *enjoyment* of *his forest*." (The italics are, of course, mine.)

[5] Code For. Art. 63.—In the discussion which took place in the Chamber of Deputies when this 63rd Article was proposed, M. Favard de Langlade (the reporter on the bill) said—"How can we acknowledge a co-proprietary character in the case

§ 4.

The authorities are quite unanimous now in accepting the principle under discussion[6]. M. Curasson speaks of the idea of co-ownership as an "aberration de toûs les principes."

And also in another place [7] that unless "the title expresses, in formal terms, a grant of proprietary right, however extensive may be the rights of user,—even if they should go so far as to cover the entire surface products of the forest,—the title would *not be* proprietary."

"And so Meaume[8]: "A right of user * * * confers on him who possesses it, a simple right to participate in the enjoyment of the produce, but in no sense in the ownership of the estate."

§ 5.

The German authorities are exactly to the same effect. "To the right-holder," says Dr. Pfeil[9] "nothing is conceded but the enjoyment of a certain part of the produce of the forest, and to concede him something quite different from this—a proprietary right, or estate in the soil—is so contrary to every principle of law, that no one who has any grasp of the subject of private rights, could admit it for a moment." And Roth[10] speaks of "rights over *another* property which limit or restrict full ownership."

of the rights of an owner and those of a right-holder which are here opposed to one another? So far from the idea of a right of usage in the forest (which is only a kind of limited usufruct) carrying with it any idea of ownership in the soil, it excludes rather any such notion; for one cannot have a right of user *except over the soil* belonging *to some one else*." * * * * "The innovation of 1792 may have been dictated by the circumstances of the time, but it is inadmissible in the present state of things."

I may add that this Article 63 was passed *without a division*—(see M. Brousse's edition of the Code *ad hoc*).

[6] Vol. II, page 356.

[7] Vol. II, p. 264.

[8] Meaume, Vol. I, § 129.

[9] Pfeil, page 66. (See abbreviation list at the beginning for full titles of works quoted.)

[10] Roth, § 251, and see Eding (page 74) to the same effect.

So Professor Bluhme[1]. "They (servitudes) can be separately eliminated from the totality of the rights of ownership, and be transferred to one who is *not the owner* (*auf einem nichteigener.*)

And so under the Hanoverian law: "rights of ownership in the estate itself are essentially distinct from mere rights of user, and have, in many respects, effects or consequences entirely different[2]. Exactly the same is the principle laid down by the law in Saxony[3].

§ 6.

The English law authorities are, in all respects, conformable. Thus Cooke says[4]:—"A right of common has been defined to be a right which one or more persons may have to take or use some portion of that which *another person's* soil naturally produces." And, again, speaking of a peculiar right called "cattle gate," which *is* a sort of joint interest in the soil, he says:—The owner of a cattle gate holds it as having a joint interest in the soil *which* a *person having* a *right* of *common has not*[5]." And so Mr. Joshua Williams[6]. "The soil of the waste lands of a manor * * * is always vested in the Lord of the manor, notwithstanding the rights which the commoners may have upon it. The lord, therefore, as owner of the soil, has the same rights as other owners, except so far as the existence of the rights of the commoners may prevent him from exercising those rights."

§ 7.

I think, then, that the matter is beyond dispute; and I trust that the student has fully mastered the distinction itself: that he appreciates the difference between a person who has a share in the ownership, *i.e.*, in *all* the rights which go to make up the owner-

[1] System des Privat recht, § 201.
[2] Hannoverische Landes Œkonomie Gesetzgebung. (*Provinzielle gesetzgebung* § 51, page 12. (Hannover 1864.)
[3] Qvenzel, p. 180 (Reallasten.)
[4] Cooke, page 5.
[5] *Ibid*, pages 43—44.
[6] Williams, p. 150.